Filed 2/19/09 In re Vincent S. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re VINCENT S., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. JUANITA D., Defendant and Appellant.	G040629 (Super. Ct. No. DP013613) O P I N I O N

Appeal from orders of the Superior Court of Orange County, Caryl Lee, Judge. Affirmed.

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, and Karen L. Christensen, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

* * *

Four months after reunification services for Juanita D. (mother) were terminated, she filed a Welfare and Institutions Code[1] section 388 petition, which was denied. Less than five months later, and shortly before the scheduled section 366.26 selection and implementation hearing, she filed another section 388 petition, which was also denied. Soon thereafter, her parental rights to Vincent S. were terminated.

Mother appeals from the order denying her second section 388 petition and from the order terminating her parental rights. She claims the court abused its discretion in denying her section 388 petition and applied the wrong legal standards in determining that the section 366.26, subdivision (c)(1)(B)(i) beneficial parent-child relationship exception did not apply. We disagree. The orders are affirmed.

I

FACTS

On June 14, 2006, at about 9:00 p.m., several people showed up at the home of Vincent's maternal aunt. They appeared to be under the influence of drugs and had two-year-old Vincent with them. They said that they were unaware of mother's whereabouts and could not take care of Vincent any longer. The maternal aunt was concerned about Vincent's welfare and took him off the hands of the deliverers. She was also concerned that, if mother should show up to claim Vincent, he would be at risk in her care. The maternal aunt believed that mother was homeless and had been using drugs four about four years. The family previously had staged an unsuccessful intervention concerning the drug use.

The maternal aunt, the paternal aunt, and the paternal grandmother got together and took Vincent to Orangewood Children's Home, on June 14, 2006. The next day, an intake social worker contacted Vincent's father, who said that he was unable to care for Vincent and that mother was homeless, "'on drugs'" and "not 'stable at all.'" On

[1] All subsequent statutory references are to the Welfare and Institutions Code unless otherwise specifically stated.

June 16, 2006, a juvenile dependency petition was filed. The detention report alleged that mother had a history of child neglect, as well as an 11-year criminal history. The court ordered Vincent detained under the protective custody of the Social Services Agency (SSA). On July 5, 2006, Vincent was placed in his paternal grandmother's home. In May 2007, mother moved to Nevada.

In the August 15, 2007 status review report, SSA reported that mother's case plan compliance was unsatisfactory. It stated she had not participated in individual counseling, or in family, conjoint, or group therapy, had not participated in either a parenting education program or a substance abuse program, and had not tested for drug or alcohol use. SSA also reported that mother was unemployed and had not visited Vincent consistently. SSA recommended that the court terminate reunification services to mother and schedule a section 366.26 hearing. On October 2, 2007, the court ordered that reunification services be terminated and that a section 366.26 hearing be held within 120 days. The section 366.26 hearing was set for January 30, 2008.

In the section 366.26 report signed January 16, 2008, SSA reported that Vincent was a sweet, smart, healthy four year old, who continued to reside with his paternal grandmother. The report stated: "The child appears to be emotionally well adjusted. The child is very bonded to the family as well as the family being very bonded to the child. This includes the caregiver and her husband and the caregiver's nineteen-year-old daughter, Elizabeth." In addition, the report stated: "The child's current caregivers are interested in being appointed the child's legal guardian. The caregivers do not wish to adopt the child because they do not want the parents[']parental rights terminated and would like the child to continue to have a relationship with his parents. The prospective legal guardians desire to provide a permanent home for a permanent plan for the child, Vincent."

SSA also reported that mother had enrolled in a drug treatment program on October 10, 2007. On October 24, 2007 and November 28, 2007, she tested positive for

marijuana. The report further stated: "The mother's counselor reported . . . that the main issue is that the mother does not think that using marijuana is a problem." Mother had clean drug tests on December 12 and 19, 2007. As of the date of the January 2008 report, mother was five months pregnant with another child.

In addition, SSA stated that mother had visited Vincent three times in October 2007, not at all in November 2007, twice in December 2007, and once to date in January 2008, with another visit scheduled for later that month. Mother had informed SSA that she was trying to visit Vincent twice a month and talk with him three times a week on the telephone. SSA recommended that Vincent's then current caregivers be appointed legal guardians.

On January 30, or February 1, 2008, mother filed her first section 388 petition. She requested that the court either return Vincent to her custody or reinstate reunification services. She stated that this would be in Vincent's best interests and that she had made some positive changes. Mother explained that she had moved to Nevada in order to remove herself from bad influences. She declared that she and Vincent shared the bond of love and exchanged hugs and kisses at visits.

Mother said that she had enrolled in a group counseling and drug testing program on October 10, 2007 and that all of her drug tests had been clean since December 12, 2007. She stated: "I have learned that marijuana was a problem for me and I learned how to eliminate it from my life. My counselor expects my treatment to be completed in another 2-3 months." She attached a letter from the program provider and copies of seven lab reports, including the two showing positive test results in October and November 2007.

In addition, mother provided information on several other programs. On January 2, 2008, she completed a practical parenting education program, as evidenced by a certificate of completion and a letter from the program provider. On November 14, 2007, she began attending a women's support group, addressing responsible parenting,

domestic violence and other issues, and had completed eight classes, as evidenced by a letter from the program provider. Finally, in connection with her receipt of public assistance in Nevada, mother had signed a personal responsibility plan with her Nevada social worker, as evidenced by a letter from the social worker and a copy of the plan.

The court denied the section 388 petition, because the petition neither stated new evidence/changed circumstances nor showed that the requested relief would be in Vincent's best interests. The court remarked that mother was getting started on her services "very, very late" and that the focus at that point had to be on Vincent, "a very young child." Mother did not appeal from this order.

In its February 19, 2008 addendum report, SSA stated that Vincent's caregivers had become interested in adopting him. While they had previously been interested in guardianship, they decided that it would be in his best interests to adopt him, and they wanted to provide a permanent home for him. Pursuant to a permanency planning assessment, the adoptions supervisor concluded that Vincent was likely to be adopted, and SSA recommended adoption.

A May 29, 2008 section 366.26 hearing was continued to June 23, 2008 at mother's request. On June 23, 2008, mother filed her second section 388 petition. That petition was substantially the same as the first, with only three notable changes. First, mother disclosed that she had completed the group counseling and drug testing program on April 23, 2008, as evidenced by a letter from the program provider. This time, she attached no lab reports. However, the letter from the program provider, dated May 6, 2008, stated that "all drug tests in the last 5 months were negative for illicit substances." Second, mother added that she had completed 28 sessions with the women's support group, as evidenced by a letter from the program provider. Third, she deleted any reference to the Nevada public assistance program personal responsibility plan.

At the June 24, 2008 hearing, the court focused its attention on the changes since the first section 388 petition was denied. The court remained concerned about drug

issues, the fact that Vincent had been outside of mother's care for half of his life, and inconsistent visitation. It found that mother had not made a prima facie showing under section 388. The court further found that even if a prima facie showing had been made, it could not find that it was in Vincent's best interests to be reunited with mother.

The court said: "[T]his child was about two years old . . . at removal. He's four now, four-and-a-half perhaps, and he has simply not seen his mother for half of his very short life. He sees her possibly monthly, maybe twice a month, for a couple of hours at a time. [¶] And he does look to the caretakers for his day-to-day care." The court emphasized that the primary reason for denying mother's section 388 petition was that it was not in Vincent's best interests to return him to mother.

Mother, Vincent, and social worker Teresa Stevens testified at the section 366.26 hearings. Father agreed with SSA's recommendation. The court found that Vincent was likely to be adopted, that the termination of parental rights and the adoption of Vincent was in his best interests, and that the section 366.26, subdivision (c)(1)(A)(B)(i)-(vi) exceptions did not apply. It ordered that parental rights be terminated and Vincent be placed for adoption. Mother appeals.

II

DISCUSSION

A. Section 388 Order:

Section 388, subdivision (a) permits a parent whose child is a dependent child of the juvenile court to petition the court for a hearing to change any previous court order, or to terminate the jurisdiction of the court, on the basis of a change of circumstances or new evidence. Subdivision (c) of that statute, as in effect in 2008, provided: "If it appears that the best interests of the child may be promoted by the

proposed change of order, . . . or termination of jurisdiction, the court shall order that a hearing be held . . . ."[2]

"A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.]" (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) "[I]f the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. [Citations.]" (*Ibid.*) "The juvenile court's determination to deny a section 388 petition without a hearing is reviewed for abuse of discretion. [Citations.]" (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.)

Mother argues that she made a prima facie showing under section 388 that triggered her right to an evidentiary hearing. She says that given the evidence she presented, the court's action was arbitrary, patently absurd, and an abuse of discretion.

A review of the record shows that mother did present some evidence of changed circumstances. She showed that she had completed a practical parenting education program on January 2, 2008, had completed a group counseling and drug testing program on April 23, 2008, and had completed 28 sessions with a women's support group, no later than June 23, 2008. However, the court remained concerned about drug issues and the fact that Vincent had resided outside of mother's care for half of his life.

Although mother provided a May 6, 2008 letter from the group counseling and drug testing program stating that mother had tested clean for drugs in the preceding five months, five months is a relatively short period of time in relation to the number of

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[2] See now section 388, subdivision (d), as currently in effect.

years mother had been using drugs. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 463.) Mother, on July 12, 2006, had admitted to the assigned social worker that she had used methamphetamine off and on for the preceding five years. In addition, lab reports showed that mother had tested positive for marijuana in October and November 2007, when she was pregnant. Mother's counselor expressed concern that mother did not consider marijuana use to be a problem. While the group counseling and drug testing program letter indicated that mother had been clean for the preceding five months, no lab reports were attached and there was no evidence that mother continued to remain clean at the time she filed her second section 388 petition in the second half of June, 2008.

Even assuming mother put on a prima facie showing of changed circumstances, this was not all she needed to do to entitle her to a hearing. Mother had a two-prong burden to meet. She needed to show, by a preponderance of the evidence, not only changed circumstances, but also that it would be in Vincent's best interests to return to her. (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 806.) The "simple completion of the kinds of classes taken by the mother . . . does not, in and of itself, show prima facie that either the requested modification or a hearing would be in the minor's best interests. [Citations.]" (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 463.)

Of course, in addition to the evidence of program completion, mother attached to her petition her own declaration stating that she and Vincent had a loving relationship, and gave each other hugs and kisses. She also attached undated photos of herself and Vincent together, each smiling. However SSA's March 11, 2008 addendum report stated Vincent "obviously loves the prospective adoptive parents, and expressed that he wishes to stay with them."

Mother cites *In re Aljamie D.* (2000) 84 Cal.App.4th 424, a case wherein the appellate court held that the juvenile court should have held an evidentiary hearing on the section 388 petition. (*Id.* at p. 426.) In *In re Aljamie D.*, the mother "had completed numerous educational programs and parenting classes, and had tested clean in weekly

random drug tests for over two years. She had visited consistently with the children and continued to have a strongly bonded relationship with them." (*Id.* at p. 432.) In addition, in their testimony, both of the "children, ages 9 and 11, repeatedly made clear that their first choice was to live with their mother." (*Id.* at pp. 430, 432.)

The situation here is distinguishable from the one in *In re Aljamie D., supra,* 84 Cal.App.4th 424. Here, mother completed certain programs and provided evidence that she had tested clean for drugs for a shorter, five-month period. However, she had had inconsistent visitation with Vincent. Moreover, although she declared that she and Vincent had a loving bond, the record also reflected that Vincent loved his paternal grandmother, with whom he had then spent half of his life and with whom he wanted to stay.

"The conditional language of section 388 makes clear that the hearing is only to be held if it appears that the best interests of the child may be promoted by the proposed change of order, which necessarily contemplates that a court need not order a hearing if this element is absent from the showing made by the petition. [Citation.]" (*In re Zachary G., supra,* 77 Cal.App.4th at pp. 806-807, fn. omitted.) Even though there was some evidence of changed circumstances, "there was no independent evidence . . . that it was in [Vincent's] best interests to be removed from the . . . home and caretakers he . . . [knew], and thereby be deprived of the stability of a permanent home, in order to be returned to a parent who remained a risk (based on . . . her historical patterns) . . . ." (*Id.* at p. 808.)

"[M]other's petition does not demonstrate how a change in the order would be in the best interest of [this child]. [Citation.] At this point in the proceedings, on the eve of the selection and implementation hearing, the [child's] interest in stability was the court's foremost concern, outweighing any interest mother may have in reunification. [Citation.] Mother made no showing how it would be the [child's] best interest to continue reunification services, to remove [him] from [his] comfortable and secure

placement to live with mother who has a long history of drug addition . . . . The [child] should not be made to wait indefinitely for mother to become an adequate parent. [Citation.] There was no abuse of discretion in denying mother's petition." (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 251-252; accord, *In re Angel B., supra*, 97 Cal.App.4th at p. 464.)

B. Section 366.26 Order:

"At the selection and implementation hearing held pursuant to section 366.26, the court must choose a permanent plan for the dependent child. The court may terminate parental rights and order adoption; identify adoption as the permanent goal and order efforts made to locate an adoptive family within [180] days without terminating parental rights; order legal guardianship without terminating parental rights; or order long-term foster care without terminating parental rights. (§ 366.26, subd. (b).)" (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1533-1534.)

"Under section 366.26, subdivision (c)(1), '[t]he court shall terminate parental rights only if it determines by clear and convincing evidence that it is likely that the minor will be adopted . . . .' If the court finds the child adoptable, it must terminate parental rights unless it finds that termination would be detrimental to the child due to one of four circumstances. The one pertinent to our case is section 366.26, subdivision (c)(1)[(B)(i)]: 'The parents . . . have maintained regular visitation and contact with the [child] and the [child] would benefit from continuing the relationship.'" (*In re Brandon C., supra*, 71 Cal.App.4th at p. 1534, fn. omitted.)

Mother argues that the section 366.26, subdivision (c)(1)(B)(i) exception applies here. She contends the court applied the wrong legal standards in ascertaining whether each of the two prongs of the exception had been met, that is: (1) whether she had "maintained regular visitation and contact with" Vincent; and (2) whether Vincent "would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)

With respect to the first prong, mother baldly asserts that the court applied the incorrect standard because it required "perfect visitation." However, mother cites no portion of the record to support this assertion. We observe that the court found visitation to be inconsistent and that the record on appeal supports this finding. Indeed, SSA repeatedly reported that mother had not maintained regular visitation, and also reported that she sometimes failed to show for scheduled visits. Mother was permitted weekly visitation, but she did not visit Vincent at all in December 2006, March 2007, June 2007, November 2007 and May 2008, although the failure to visit in May 2008 was due to her pregnancy. She visited him only once per month in January, July, August and September 2007. Mother visited Vincent only twice per month in November 2006, and February, April, May and December 2007 and March 2008. There were very few months in which mother visited Vincent more than twice.

In her reply brief, "Mother admits that she did not take advantage of every offered in-person visit with Vincent." However, she maintains that "she did maintain regular contact with Vincent through phone calls and supplemented that contact with successful in-person visits."

The point of the matter is that the court nowhere stated that because the statute required "perfect visitation," and that mother had not achieved "perfect visitation," she failed to meet the first prong. There is simply no indication that the court applied the wrong standard, and substantial evidence supports the court's finding that visitation was inconsistent.

Similarly, the court's comments with respect to the parental relationship did not demonstrate that it applied the wrong standard with respect to the second prong. The court acknowledged that Vincent loved mother. However, it stated in addition: "[I]t is also worthy of note that the child, when he testified, he spoke more frequently about his grandmother . . . than anyone else. . . . So there were . . . things that he tied in with his life with the caretaker and there simply was more of a richness and a parental role played

by the caretaker in Vincent's life." There was nothing wrong with the court's consideration of these points.

In applying section 366.26, subdivision (c)(1)(B)(i), "we interpret the 'benefit from continuing the [parent/child] relationship' exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The burden is upon the parent to make this showing. (*Id.* at p. 574.)

"Courts have required more than just 'frequent and loving contact' to establish the requisite benefit for this exception. [Citation.] 'Interaction between natural parent and child will always confer some incidental benefit to the child. . . .'" (*In re Brandon C., supra,* 71 Cal.App.4th at p. 1534.) Certainly, mother here maintained contact with Vincent and this conferred some benefit upon him. However, the court nonetheless found that "there [was] just simply not regular visitation that if the court were to terminate that visitation, that the child would suffer a detriment."

"On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. [Citations.]" (*In re Autumn H., supra,* 27 Cal.App.4th at p. 576.) Given the evidence of a loving, rich relationship between Vincent and his paternal grandmother, and the inconsistent visitation between Vincent and mother, there is

substantial evidence to support the finding that the he would not suffer great harm if his relationship with mother were severed.

III

DISPOSITION

The orders are affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, ACTING P. J.

FYBEL, J.